



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 30, 1994

Ms. Rebecca Lightsey
Commissioner
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR94-881

Dear Commissioner Lightsey:

The Texas Department of Insurance (the "department") asks whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. We assigned this request ID# 14015.

The department has received a request for information relating to a sexual harassment investigation. Specifically, the requestor seeks copies of the alleged sexual harassment charges filed against him. The department claims that section 552.101 of the Government Code, in conjunction with common-law privacy doctrine and the informer's privilege, excepts the requested information from required public disclosure.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The department claims that the information submitted to us for review is protected by the doctrine of common-law privacy. Information may be withheld from required public disclosure under common-law privacy if it meets the criteria articulated for section 552.101 by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.); *see also* Open Records Decision No. 441 (1986). Under *Industrial Foundation*, information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing *and* it is of no legitimate concern to the public. Although information relating to a disciplinary action against a public employee may be highly intimate or embarrassing, the public generally has a legitimate interest in knowing the reasons why such an action was taken. *See* Open Records Decision No. 444 (1986).

In Open Records Decision No. 579 (1990), this office held that common-law privacy did not apply to witness names and statements regarding allegations of sexual misconduct. Recently, however, the court in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigatory files at issue in *Ellen* contained individual witness and victim statements, an affidavit given by the individual accused of the misconduct in response to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *Id.* The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest in this matter was sufficiently served by the disclosure of these documents. *Id.* at 525. The court held that the nature of the remaining information, *i.e.*, the names of witnesses and their detailed affidavits regarding allegations of sexual harassment, was exactly the kind of information specifically excluded from disclosure under the privacy doctrine as described in *Industrial Foundation*. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*¹

The department has submitted to us for review several sexual harassment complainant statements and a document titled "Incident Report," which summarizes the department's investigation of the sexual harassment allegations. Except for the type of information that we have marked that identifies or tends to identify the complainants and witnesses, *i.e.*, social security numbers, addresses, dates of birth, positions of employment, we conclude that the department must release the submitted summary. However, the department must withhold the submitted complainant statements in their entirety under section 552.101 of the Government Code in accordance with the court's holding in *Ellen*.²

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records.

¹Although the *Ellen* court recognized that the person accused of misconduct may in some instances have a privacy interest in information contained within investigatory files, we think in this case the public's interest in disclosure of the information outweighs the accused's privacy interest. *See Ellen*, 840 S.W.2d at 525.

²You also claim that the information submitted to us for review is protected under section 552.101 of the Government Code in conjunction with the informer's privilege. The content of an informer's statement is protected only to the extent that it would reveal the informer's identity. *See Open Records Decision Nos. 549 (1990) at 5; 515 (1988)*. As we protect the identities of the complainants and the witnesses under the court's holding in *Ellen*, we need not consider whether such information is protected by the informer's privilege.

If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Loretta DeHay". The signature is written in a cursive, flowing style.

Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/GCK/rho

Ref.: ID# 14015
ID# 14174

Enclosures: Marked documents

cc: Mr. Charles Sobeck
Texas Department of Insurance
Loss Control MC 109-4A
P.O. Box 149104
Austin, Texas 78714-9104
(w/o enclosures)